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THE LAW GOVERNING AN ORIGINAL PACKAGE.

(Continued from July-August Number, *ante*, page 483).

XII.

The next case, in the order of time, was that of *U. S. v. Holliday*, decided in 1866, and reported in 3 Wall. (70 U. S.) 407. The subject for decision was the extent of the power to regulate commerce with the Indian Tribes, and must be omitted here, from developing no new principles, as may be seen from an examination of the case just alluded to, with those of *U. S. v. 43 Gallons of Whiskey* (1876) 3 Otto (93 U. S.) 188, and *s. c.* (1883) 108 U. S. 491; *U. S. v. LeBris* (1887) 121 U. S. 278; *Bates v. Clark* (1877) 5 Otto (95 U. S.) 204.

XIII.

An original package is one which has been brought from another State or Nation, and not merely one which has paid a tax to the United States.

A license granted under the taxing powers of the United States does not necessarily authorize the carrying on of the business, trade or manufacture licensed; thereby differing from a license under the commerce powers.

An internal revenue license, obtained by a lottery ticket dealer or a retail liquor dealer, does not authorize sales of lottery tickets or liquor. The licensee has merely paid a tax to the United States.

Each State has authority over the business, trade and manufactures of its citizens, until its regulations conflict with the commerce or other Constitutional powers of the United States.

The License Tax Cases (1867), 5 Wall. (72 U. S.) 462, did much towards defining the power of a State over the business or trades of its citizens. The first of these cases was an indictment of Rufus B. Vassar, in the United States Circuit Court for the Northern District of New York, October 20, 1863, for carrying on the business of a lottery ticket dealer without the license required by the Act of Congress:—

CHAP. CXIX. *An Act to provide Internal Revenue to support the Government, and to pay interest on the Public Debt.* (Approved July 1, 1862; 12 Stat. at Large 433.)

SEC. 57. *And be it further enacted*, That from and after the first day of August, eighteen hundred and sixty-two, no person, association of persons, or corporation, shall be engaged in, prosecute, or carry on, either of the trades or occupations mentioned in section sixty-four of this Act, until he, she, or they shall have obtained a license therefor, in the manner hereinafter provided.

This Section was re-enacted in Section seventy-one of the Act of June 30, 1864 (13 Stat. at Large 248), and again by the Act of July 13, 1866 (14 Id. 113), where the word *license* was changed to *special tax*. This was considered by Chief Justice CHASE to be conclusive as to the intention of Congress, when originally imposing this tax, of not intruding upon the strictly internal affairs of a State.

The penalty inflicted by Section fifty-nine of the Act of 1862, (12 Stat. at Large 453) was three times the license; to it was added imprisonment, by Section twenty-four of the Act of March 3, 1863 (Id. 727); and then converted into payment of the license, with fine or imprisonment or both, by Section seventy-three of the Act of June 30, 1864 (13 Id. 249). This was again changed to fine, or imprisonment, or both, by Act of July 13, 1866 (14 Id. 113), and to a fine only by Act of March 2, 1867 (Id. 473). But there was no immunity from punishment under State laws, in any of these Acts.

The Act of 1862 also contained the express disclaimer of

superior authority, in those portions printed in roman type of—

SEC. 67. *And be it further enacted*, That no license hereinbefore provided for shall, if granted, be *held or construed to exempt any person carrying on the trade, business, or profession specified in said license, from any penalty or punishment provided by the laws of any State for carrying on such trade, business, or profession, within such State, or in any manner* authorize the commencement, or continuance of [any] *such* trade, business, [occupation or employment] *or profession* [therein mentioned, within any State, or Territory of the United States, in which it is, or shall be specifically prohibited by the laws thereof, or in violation of] *contrary to the laws of [any] such State [or Territory], or in places prohibited by municipal law; [Provided, nothing contained in this Act shall] nor shall any such license* be held or construed [so as] to prevent *or prohibit any State* [the several States], from placing a duty *or tax* [or license, for State *or other* purposes, on any *trade, business, [matter or thing] or profession, [on] for which a [duty, tax, or] license is required [to be paid] by this Act; nor shall any person, carrying on any trade, business or profession, for which a license is required by this Act be exempt from procuring such license, or from any penalty or punishment herein provided, by, or in consequence of, any State law either authorizing or prohibiting such trade, business or profession.*

The *italicised* words were inserted and the bracketed words omitted in the re-enactment of this section by the Act of June 30, 1864 (SEC. 78, 13 Stat. at Large 250-1). These changes are a significant Congressional exposition of the original Act of 1862, long before the Supreme Court came to apply the same interpretation.

Section Sixty-four of the Act of 1862 did not mention lottery ticket dealers, who remained untaxed until the amendatory Act of March 3, 1863, Sec. 37, (12 Stat. at Large 715) which fixed one thousand dollars as the tax; which was the amount fixed by Section seventy-nine of the Act of June 30, 1864 (13 Id. 252). This sum was diminished to one hundred dollars by Section nine of the Act of July 13, 1866, (14 Id. 116) and the tax was finally removed by the Act of July 14, 1870 (16 Id. 256). At no time was there any attempt to give the tax or license an exclusive effect upon State laws.

Section two of the Act of 1863 (12 Stat. at Large 718), required the use of stamps on the lottery tickets; and Sec-

tions one hundred and eleven to thirteen of the Act of 1864 (13 Id. 279) required a tax upon the gross receipts and inflicted money penalties upon both the buyer and seller of unlicensed lottery business, with this significant—

Provided, further, That nothing in this section [113] contained shall be construed to legalize any lottery.

There were other details respecting lotteries in the supplementary Act of March 3, 1865 (13 Stat. at Large 472, 485), but no legalizing clauses.

The sending of letters and circulars respecting lotteries was not forbidden until the Act of July 27, 1868, Section 13, (15 Stat. at Large 196,) so that no such question of illegality hampered the decision of the Supreme Court.

Returning to the case under consideration, it appears that the defendant demurred to the indictment, because the State laws made the carrying on of his business a criminal offense, and he therefore contended that Congress could not license his crime. The Judges of the Circuit Court differing in opinion, the case was certified to the Supreme Court, where Chief Justice CHASE delivered the unanimous opinion of the Court, adverse to the defendant because the payment of the license would not give any rights against the State laws.

Recurring, though without naming the case, to *Gibbons v. Ogden*, the Chief Justice affirmed its particular principle (*ante*, page 428)—

It is not doubted that where Congress possesses Constitutional power to regulate trade, or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give the licensee authority to do whatever is authorized by its terms: (5 Wall. 72 U. S. 470).

Applying still another principle of the same case (*ante*, page 435), the Chief Justice proceeded to lay down the obvious conclusion—

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress, with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted

to the legislature. The power to authorize a business within a State, is plainly repugnant to the exclusive power of the State over the same subject.

It is true that the power of Congress to tax, is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it.

The granting of a license, [of this kind] therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing, except that the licensee shall be subject to no penalties under national law, if he pays it: (5 Wall. 72 U. S. 470, 471).

Calling attention to the careful limitations against legalizing what had been forbidden by State laws, the Chief Justice considered that the two lines of legislation, State and Congressional, proceeded to the same result, and, therefore no public morality or policy could be violated in convicting the defendant for not paying a license fee or tax for that business which it was a crime to pursue.

The second and succeeding cases were suits in the United States District Court for New Jersey, for the penalty incurred by selling lottery tickets, without a license. The Court gave judgment for the defendants, because the laws of New Jersey made such sale a criminal offense. These judgments were affirmed in the Circuit Court by Justice GRIER, but reversed without his dissent, by the Supreme Court, upon the principles already stated.

Pervear v. Mass. (1867), 5 Wall. (72 U. S.) 475, arose from the indictment of Pervear, in the State Court of Massachusetts, for keeping an illegal drinking place. His defense was based upon his supposed right to sell (1) from having procured the liquor seller's license, required by the Internal Revenue law, and (2) from having paid the tax on the liquor sold, as required by the same law. Upon the first point the Act of 1862 provided—

SEC. 64. 4. Retail dealers in liquors, including distilled spirits, fermented liquors, and wines of every description, shall pay twenty dollars for each license.

The Acts of March 3, 1863 (12 Stat. at Large, 716); June 30, 1864, (13 Id. 252); July 13, 1866 (14 Id. 116), contained similar provisions. And the decision of the Supreme Court of the United States was the same as in the lottery cases just considered.

The second point was said by Chief Justice CHASE, in delivering the opinion of the Court, to be nothing more than a different form of the first, and not supported by the decision in *Brown v. Md.* (*ante*, page 439), because that case did not establish the right to sell a package upon which a tax had been paid to the United States, but merely imported packages in the hands of the importers; and this, because the general power of the United States to tax, was admittedly a power concurrent with the State power of taxation.

A shadow of an argument appeared in the fact that the sales of the liquor had been in the original packages upon which the internal revenue tax had been paid. But it has already appeared (*supra*, page 443), that the term, original package, could not be so used unless there had been an import and the importer was offering for sale the import without having mingled it with other property taxable by the State, *e. g.* by breaking up the original package: *Waring v. The Mayor* (1869), 8 Wall. (75 U. S.) 110. Here Pervear was not an importer and did not aver that his liquor had been imported even from another State. Hence the liquor, in contemplation of law, in this appeal from the highest Court of Massachusetts, was either home-made or in second hands, and was therefore subject to the State law, as decided in the *License Cases* (*supra*, pages 453, 457).

There was also an attempt to defend against the State law as imposing excessive penalties, but it came to nothing because the Eighth Amendment does not apply to State legislation, but is a restriction upon the power of Congress. For this, the case is often cited.

Seven cases were also removed from the Supreme Court of Iowa, by the various defendants who had been convicted, under the State law (§ 2359, McClain's Ann. Code, 1888), of

keeping a place for the sale of intoxicating liquors: *The State v. Carney* (1865), 20 Iowa 82, where the opinion of the State Supreme Court was squarely placed by Judge DILLON upon section sixty-seven of the Revenue Act: (*ante*, page 723). The defendants contended, in the Supreme Court of the United States, that their licenses gave the right to sell; and this was denied for the same reasons as those used in the lottery cases, *supra*. These liquor licenses had been obtained under the same Act of 1862, as in *Perwear v. Mass.*, *supra*.

This exclusiveness of the State authority has been recognized as the important feature in these decisions, by Justice MILLER, in the *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, 64; Justice FIELD, in *U. S. v. 43 Gals. Whiskey* (1883), 108 U. S. 491; Justice HARLAN, in *Mugler v. Kansas* (1887), 123 Id. 623, 646; Justice LAMAR, in *Kidd v. Pearson* (1888), 128 Id. 1, 24; Justice WOODS, in *Presser v. Illinois* (1886), 116 Id. 252, 268.

The *License Tax Cases* also developed that the possession of a license did not assure immunity from further regulation. This subject is much wider than a division of interstate commerce, as it extends (*e. g.*) into that portion of the domain of foreign corporation law which lies beyond the Constitutional protection of the obligation of contracts: *Home Ins. Co. v. City Council* (1876), 3 Otto (93 U. S.) 116, 122; as well as into all those questions of contract which are within this Constitutional protection of contracts: *Royall v. Va.* (1886), 116 U. S. 572, 580, 583.

XIV.

Imports and exports are terms applicable to merchandise in trade with foreign nations, and not among the States of the Union.

Goods brought from another State may be taxed, after their arrival and while in their original packages, because not imports; but there must be no injurious discrimination in the tax in favor of home-made articles.

A State may not tax interstate commerce or goods coming from other States because of their origin.

A State may not lay a stamp tax on bills of lading issued either for exports or merchandise consigned to a place in another State.

Woodruff v. Parham (1869), 8 Wall. (75 U. S.) 123, was an action of trespass begun in the State Circuit Court of Mobile, Alabama, by Woodruff & Parker, auctioneers and commission merchants, of Mobile, against Parham, the tax collector of that City, for damages suffered by the seizure of their merchandise for the non-payment of the City tax of fifty cents on the hundred dollars in value of their gross sales of merchandise in the original packages in which they came from other States for this purpose. The payment of the tax was resisted as inconsistent with Section Ten of the First Article of the Constitution (*supra*, page 425). Judgment being rendered against the plaintiffs, they removed the case to the State Supreme Court, where it was affirmed June 5, 1867, on the authority of their decision in *Hinson v. Lott* (*infra*, page 735), on an opinion by Chief Justice WALKER, 41 Ala. 334, 337.

The Alabama Court proceeded upon two grounds: *first*, that the States had concurrent power over commercial subjects until Congress positively acted, notwithstanding the principles of *Cooley v. Port Wardens* (*supra*, page 466), out of which has grown the present rule, that the State cannot legislate at all upon subjects admitting of uniform regulation, as to which the non-action of Congress is significant of an intention to permit entire freedom: *supra*, pages 420, 445, 448, 453.

Second, the Alabama Court followed Justices McLEAN, CATRON, DANIEL and WOODBURY, in the *License Cases* (5 How. 46 U. S. 594, 611, 614, 623), and declared the Constitutional meaning of an import was something introduced from a foreign country and not from a neighboring State. This construction involved a consideration of the opinion in *Almy v. State of California* (1861), 24 How. (65 U. S.) 169,

where Chief Justice TANEY, with the assent of Justices McLEAN, WAYNE, CATRON, NELSON, GRIER, CAMPBELL and CLIFFORD, declared the State law void for imposing a stamp tax upon bills of lading for gold and silver transported "from any point or place in this State, to any point or place without the limits of this State : " Act of April 26, 1858, Statutes of 1858, page 305. *Brown v. Maryland* (*supra*, page 439) was unqualifiedly followed, though the gold was consigned to New York City and not to a foreign port, and the Alabama Chief Justice was disingenuous enough to say—

The statement of the facts of the case is very meagre, and found only in the opinion of the Court. From that statement, it cannot be ascertained that the gold was not shipped [*sic!*] to New York, in *transitu* for some foreign port. From some expressions in the argument of the Court, we infer that such was the case : (40 Ala. 134).

An examination of the printed record discloses nothing to support this inference. On the contrary, the indictment in the Court of Sessions of the City and County of San Francisco, charged that—

John C. Almy, Jr., is accused by the Grand Jury of the City and County of San Francisco, State of California, by this indictment, found this twentieth day of August, A. D., 1858, of the crime of misdemeanor, committed as follows :

The said John C. Almy, Jr., * * * * being the master of said ship, as aforesaid, * * * made and executed, upon a piece of paper, a written and printed contract with the said Peter Prest, for the transportation and conveyance of the said gold dust of the value aforesaid, from the port of San Francisco aforesaid, to the port of New York aforesaid, a point outside of the limits of the State of California aforesaid, for and in consideration of one per cent. upon said gold dust, to be paid as freight by the said Peter Prest, his order or assign, on delivery of said gold dust at the Port of New York aforesaid.

Upon a re-argument, the Chief Justice admitted his error, after examining the printed transcript; but he then took the position that the question of export to another State had been passed without notice, and, as decided, was in conflict with the opinions in the *License Cases*: (40 Ala. 138, 141).

When these Alabama cases reached the Supreme Court of the United States, Justice MILLER, in writing the opinion, adopted this last view of Chief Justice WALKER, to the ex-

tent that the Court had overlooked the interstate feature of the bill of lading, and distinguished the precedent of that opinion by saying that it was well decided as the law conflicted with the Constitutional freedom of interstate commerce, within the rule laid down in *Crandall v. Nevada*, *supra*, page 464 ; STRONG, J., in *Case of the State Freight Tax* (1873), 15 Wall. (82 U. S.) 232, 280; BLATCHFORD, J., in *Pickard v. Pullman S. C. Co.* (1886), 117 U. S. 34, 48. Still, the stamp required by this California law was said to be an export tax, by Justice BRADLEY, in *Pace v. Burgess* (1876), 2 Otto (92 U. S.) 372, 376; and by Justice MILLER himself, in the *Trade Mark Cases* (1879), 10 Otto (100 U. S.) 82, 95.

As a consequence of these views, the Supreme Court of the United States unanimously upheld this tax as one imposed on all sales of merchandise without regard to the State where the seller resided or whence the goods had been shipped, so long as no injurious discrimination ensued.

As already noticed (*supra*, page 440), there has been supposed to be a conflict between the principles of *Brown v. Maryland* and *Woodruff v. Parham*, notwithstanding the declaration of Justice MILLER, that the authority of *Brown v. Maryland*, was not to be questioned nor its principles departed from in this decision. The cause of this supposition may be inferred from the actual point decided in *Woodruff v. Parham*, as just mentioned in the last paragraph. The consequences of this principle will be considered later, in order to observe that the decision thus reached, depended upon confining the terms, *imports* and *exports*, to commerce with other nations, and to this extent overruling *Almy v. California*.

The authority of *Brown v. Maryland*, therefore, seems to have been unqualifiedly admitted in connection with the commerce power, but not with that over imports and exports; for Justice MILLER used this language:—

The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that State, taxing by way of discrimination, importers who

sold by wholesale foreign goods. Chief Justice MARSHALL in delivering the opinion of the Court, distinctly bases the invalidity of the statute, (1) On the clause of the Constitution which forbids a State to levy imposts or duties upon imports; and (2) That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes. The casual remark, therefore, made at the close of the opinion, "That we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question. even if the remark was intended to apply to the first ground on which that decision was placed.

If the Court then meant to say that a tax levied upon goods from a sister State, which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition: (8 Wall. 75 U. S. 139).

The sentence here quoted in MARSHALL'S words, had been objected to by Chief Justice TANEY and Justice MCLEAN, in the *License Cases* (1847), 5 How. (46 U. S.) 578, 594; and has nearly always been treated, as here, by Justice MILLER, though without his vital distinction that the fault lay in applying it to impost taxes, when it should be confined to regulations of interstate commerce. Justice GRAY, (*supra*, page 521), is the last one to fail to observe this distinction.

This exclusion in *Woodruff v. Parham*, of the Constitutional power over exports and imports, in the case of articles carried from one State to another was immediately recognized by Justice MILLER himself: *Hinson v. Lott* (1869), 8 Wall. (75 U. S.) 148, 150; and afterwards by Justice CLIFFORD, in *Ward v. Maryland* (1871), 12 Wall. (79 U. S.) 418, 429; Justice STRONG, in *State Tax on Railway Gross Receipts* (1873), 15 Wall. (82 U. S.) 284, 296-7; Chief Justice CHASE, in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, 482; Justice HARLAN, in *Guy v. Baltimore* (1880), 100 U. S. 434, 437; and Justice BRADLEY, in *Coe v. Errol* (1886), 116 Id. 517, 526; and *Brown v. Houston*, where the decision was such a direct affirmance of *Woodruff*

v. *Parham* on this definition of imports and exports, that this is the proper place for its consideration.

Brown v. Houston (1885), 114 U. S. 622, was a case which originated in a petition by S. S. Brown and J. W. Schoenmaker, of Pittsburg, Pennsylvania, trading as "W. H. Brown," praying the Judges of the Civil District Court for the Parish of Orleans, Louisiana, December 30, 1880, to enjoin J. D. Houston, a State tax collector, from seizing and selling for non-payment of certain taxes, a lot of Pittsburg coal, then in New Orleans, in the hands of the agents of the plaintiffs for sale, and still on board the barges in which it had been transported from Pittsburg. The tax sought to be enjoined had been assessed under an Act of April 9, 1880 (Laws, pages 88-103), for levying taxes on all property in the State, and the coal assessed was afterwards sold to foreign steamships and planters by the boatload. The taxes were alleged to be illegal, because the coal remained in the original packages, as the wine did in *Low v. Austin* (*supra*, page 443); but with the difference of domestic, instead of foreign, origin, as in the latter case. Attention is drawn to this point, because there have been those who thought the decision in *Brown v. Houston* to have been overruled in the *Original Package Case*, *supra*, page 491.

The injunction was dissolved, February 12, 1881, and this decree was affirmed on appeal, by the State Supreme Court, May 16, 1881: (33 La. Ann. 843). The case was then removed to the Supreme Court of the United States, and again affirmed, upon the same points of law: *first*, that the coal was not an import, with an express affirmance of *Woodruff v. Parham*; *second*, that a subsequent sale for foreign use by one who did not allege himself to be an exporter, but simply a seller to any buyer, did not establish a case for immunity from State taxation. This point was more emphatically decided in *Coe v. Errol* (1886), 116 U. S. 517 (and *infra*). *Third*, that the restriction of the terms *imports* and *exports* to trade with foreign nations, does not operate so as to allow the States of the Union to infringe upon the Constitutional power to regulate commerce among

the States. In explaining this point, there was an unqualified affirmance of the rule formulated in *Cooley v. Port Wardens* (*ante*, page 466), and applied by Justice FIELD in *Welton v. Missouri* (1876), 1 Otto (91 U. S.) 275, 282, to secure the freedom of interstate commerce in the event of the inaction of Congress upon matters of national character and admitting of one uniform regulation. Of necessity, therefore, this tax upon Brown's coal was held not to be a tax imposed upon a foreign product, or an original package, or merchandise in transit, but upon property which was taxed no more and not otherwise than other property in the State: Per BRADLEY, J., in *Coe v. Errol* (1886), 116 U. S. 517, 527, and in *Robbins v. Taxing Dist.* (1887), 120 Id. 489, 497.

Read in connection with the other cases cited in this section, there is no conflict between *Brown v. Houston* and the *Original Package Case* (*supra*, page 491). The difficulty arose from Justice BRADLEY failing to stop there. Evidently with MARSHALL'S statement (*supra*, page 443) in mind, but without sufficiently regarding the previous caution in the same case (*supra*, page 442), and perhaps hurriedly assuming a general professional knowledge of the principles of the various *Passenger Cases* (*supra*, pages 459, 462) and overlooking a traditional denial of those cases by those who seek a correct exposition of Constitutional law in the various opinions delivered in the *License Cases* (*supra*, pages 453-9), Justice BRADLEY thought the tax to be valid, because—

The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year, or two years, or only for a day. It had become a part of the general mass of property in the State, and as such, it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana. It was treated in exactly the same manner as such goods were treated: (114 U. S. 632-3).

That is, there was no attempt to destroy the coal, or confiscate it, or condemn it as a menace to the citizens of the

State, or as a commodity offensive to the policy of the State ; for—

The taxing of goods, coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed: BRADLEY, J. 114 U. S. 633.

Of course, it was carelessness to use the word *imports* in this last extract, when the early part of the same opinion had denied to such goods that term.

The equal rights clause was also invoked, but its application was emphatically denied.

There was an affirmance of State laws which do not lay a discriminating tax on articles from other States, by Justice FIELD, in *Downham et al. v. City Council of Alexandria* (1870), 10 Wall. (77 U. S.) 173; and Chief Justice CHASE, in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479; but of this last case, Justice BRADLEY subsequently remarked:—

The State Court relies upon the case of *Osborne v. Mobile*, which brought up for consideration, an ordinance of the City, requiring every express company, or railroad company doing business in that City, and having a business extending beyond the limits of the State, to pay an annual license of five hundred dollars; if the business was confined within the limits of the State, the license fee was only one hundred dollars; if confined within the City, it was fifty dollars; subject in each case to a penalty for neglect or refusal to pay the charge. This Court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States: *Leloup v. Port of Mobile* (1888), 127 U. S. 640, 647.

Naturally, Chief Justice WAITE, dissenting in *Robbins v. Taxing District* (1887), 120 U. S. 489, 500, cited the Osborne case on the subject of discrimination; which was a correct use of this opinion, as pointed out by Justice BLATCHFORD, in *Pickard v. Pullman S. C. Co.* (1886), 117 U. S. 34, 50, though without there affirming or denying its validity.

As Justice MILLER affirmed *Leloup v. Port of Mobile*, in the unanimous opinion of the Court in *Western Union Tele-*

graph Co. v. Alabama (1889), 132 U. S. 472, 477; and Chief Justice FULLER, in the opinion for himself and Justices MILLER, FIELD, BRADLEY, BLATCHFORD and LAMAR, in *Lyng v. Michigan* (1890), 135 U. S. 161, 166, against Justices HARLAN, GRAY and BREWER, dissenting on the same grounds as in *Leisy v. Hardin* (*ante*, pages 513-43); the exact result of *Woodruff v. Parham*, on the validity of State tax laws which do not discriminate against merchandise on account of the place of its origin, is, that such tax laws are strictly confined to the raising of revenue outside of the instruments of interstate commerce.

XV.

Liquor brought from another State may be taxed without discrimination, while in the original packages.

It is discrimination to tax drummers or resident agents, selling liquor brought from another State, at a higher rate than domestic sellers.

Another Alabama Case reached the Supreme Court of the United States and was decided at the same time as *Woodruff v. Parham* (*supra*, page 728), it is here separately considered that a number of cases arising out of traffic in liquors may be grouped together. In this Alabama case, John W Hinson filed a bill in chancery at Mobile against Lott, as State and County tax collector, to restrain him, amongst other things, from levying upon certain liquor brought from Ohio for sale in Mobile, for a tax of fifty cents per gallon, claimed under the State Act of February 22, 1866 (§ 13, Acts, pages 15-6). The Chancellor dismissed the bill, and, as to this point, was affirmed by the State Supreme Court, June 6, 1867 (40 Ala. 123), and by the United States Supreme Court, November 8, 1869 (*Hinson v. Lott*, 8 Wall. 75 U. S. 148), on an opinion by Justice MILLER, assented to by Chief Justice CHASE and Justices GRIER, CLIFFORD, SWAYNE, DAVID DAVIS, FIELD, BRADLEY, and STRONG. Justice NELSON dissented as he thought this case governed by *Almy v. California* (*supra*, page 728), as well as by the

principle contained in Marshall's much criticised sentence, quoted by Justice MILLER in *Woodruff v. Parham* (*supra*, page 731), concluding that—

It will be seen that the last clause of this article [*supra*, page 415], contains the doctrine of my brethren in the case before us. The people of one State have the right of egress and regress, to and from the other, for any purposes of trade and commerce, and the articles may be taxed by the State into which they are carried; but there must be no discrimination. We have gone back to the Articles of Confederation, and have incorporated into the Constitution by construction, a provision which the framers of that instrument had rejected as wholly inadequate for the protection of interstate commerce. Instead, therefore, of adopting this article into that instrument, they adopted a more complete and thorough security to the enjoyment of the privileges of this commerce—"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports:" (8 Wall. 75 U. S. 144-5).

The allusions of Justice NELSON were to Justice MILLER's opinion for the majority of the Court, affirming that principle of *Cooley v. Port Wardens* which denies a concurrent right in a State to regulate commerce until Congress should act: this principle was held to be inapplicable because another section of the Alabama Act appeared to impose a like tax on liquors manufactured in the State, and the thirteenth Section did not discriminate against the liquor brought from another State.

The Texas liquor case of *Tiernan v. Rinker* (1880), 12 Otto (102 U. S.) 123, began by the petition of B. & P. Tiernan and other liquor sellers to the District Court of Galveston County, Texas, May 31, 1876, praying for an injunction against the threatened collection by Selim Rinker as County Treasurer of an occupation tax laid by the County Court, under—

CHAPTER CXXI. An Act Regulating Taxation: (Approved June 3, 1873, Laws, page 198).

SEC. 3. That there shall be levied on and collected from every person, firm or association of persons, pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation or separate establishment, as follows: For selling spirituous, vinous, malt and other intoxicating liquors, in quantities less than one quart, two hundred dollars; in quantities of a quart, and less than ten gallons, one hundred dollars; *provided*, that this section shall not be so construed as to include any wines or beer manufactured in this State,

or when sold by druggists for medicinal purposes; and *provided further*, that this section shall not be so construed as to authorize druggists to sell spirituous or intoxicating liquors, except alcohol. For selling in quantities of ten gallons and over, one hundred dollars. * * * *

SEC. 4. That the County Courts of the several counties of this State shall have the power of levying taxes equal to the one-half of the amount of State tax herein levied, except as hereinbefore provided: * * * *

The petitioners denied the Constitutionality of such a tax because it was in effect discriminative against wine or beer sold by them, because manufactured in other States. August 11, 1876, the Court sustained Rinker's demurrer; whereupon the plaintiffs appealed to the State Supreme Court and obtained a reversal, March 29, 1877, on an opinion by Associate Justice MOORE, based upon the principles of *Welton v. Missouri*, (*infra*, page 751) though as to spirituous liquor there was no discrimination: *Higgins v. Rinker*, 47 Texas 381, 391, 393. Rinker then obtained a rehearing and an affirmance of the decree in his favor, July 11, 1877. This was upon an opinion by Chief Justice ROBERTS, who drew the distinction that the benefit of the *proviso* could only be obtained by selling the wine or beer manufactured in the State, in an establishment where no spirituous liquors were sold; the plaintiffs were selling spirituous liquors also, and therefore they could not complain of discrimination because they must pay the tax as sellers of spirituous liquors, the same as if they sold no wine or beer. Moreover—

If it be held that but one establishment was contemplated by the law, embracing the sale of either spirituous liquors, or wines, or beer, or all together, then the main object of the law will be defeated by its being contrary to the Constitution of the United States, and no revenue will be collected, and no encouragement will be given, either to the manufacture or the use of wines or beer, or both, in preference to the use of spirituous liquors: ROBERTS, C. J., *Higgins v. Rinker* (1877), 47 Texas 393, 401.

Both this opinion and the concurring one of Associate Justice GOULD, pointed out the divisibility of the Texas statute as the distinguishing feature of the case from *Welton v. Missouri* (*infra*, page 751).

The Judgment was then removed to the Supreme Court of the United States, and there affirmed, November 15, 1880, upon the unanimous opinion of Justice FIELD, recog-

nizing and approving both the doctrine of *Welton v. Missouri*, and the distinction drawn by the Texas Court: (12 Otto, 102 U. S. 127). The case is therefore chiefly valuable as an instance of exceedingly fair dealing with a State statute. The principle of yielding to the construction of the State Court was also followed in *Machine Co. v. Gage* (1880), 10 Otto (100 U. S.) 676, and (*infra*, page 753), though the true principle is to examine the obvious effect of the statute under consideration. This is the principle upon which all State laws, laying taxes upon persons, have been declared void: *supra*, page 441, and *infra*, page 755.

Another liquor case began in the Police Court of Grand Rapids, Michigan, June 19, 1883, by complaint against Samuel A. Walling, for selling at wholesale without paying the tax required by—

AN ACT to impose a tax on the business of selling spirituous and intoxicating, malt, brewed, and fermented liquors in the State of Michigan to be shipped from without this State: (Approved May 3, 1875, Laws, pages 271-2; Howell's Stat. § 1277).

SECTION 1. *The People of the State of Michigan enact*, That every person who shall come into, or being in this State, shall engage in the business of selling spirituous and intoxicating, malt, brewed, or fermented liquors to citizens or residents of this State, at wholesale, or soliciting or taking orders from citizens or residents of this State for any such liquors, to be shipped into this State, or furnished, or supplied at wholesale to any person within this State, by a person, co-partnership, association, or corporation, not resident in this State, nor having his, their, or its principal place of business within this State, shall, on or before the fourth Friday of June in each year, pay a tax of three hundred dollars if engaged in selling, or soliciting, or taking orders for the sale of such spirituous and intoxicating liquors, and one hundred dollars for malt, brewed, or fermented liquors. Such tax to be paid to the Auditor General, and be by him paid into the State treasury, to the credit of the general fund. [The remaining sections provide for exhibiting the tax receipt and for punishing violation of the law]

By Act of May 19, 1881 (Laws, pages 148-9); Howell's Stat. § 1281), in force at the time of Walling's arrest, resident liquor manufacturers and wholesale dealers were taxed two hundred dollars for sales of malt, brewed, or fermented liquors, and five hundred dollars for sales of spirituous or intoxicating liquors; so that the discrimination was in favor of dealers in other States, but was strongly against drum-

mers from other States, as agents of resident dealers paid in tax at all.

Walling was convicted and fined by the Police Judge: and, on appeal, in the Circuit Court of Kent County, the Judge (Hon. ROBERT M. MONTGOMERY), charging the jury that as the statute had not been passed upon by the State Supreme Court, he would treat it as valid. This conviction was affirmed, April 9, 1884, by the State Supreme Court, on an opinion by SHERWOOD, J., with the concurrence of THOMAS M. COOLEY, C. J., and CAMPBELL, and CHAMPLIN, A. JJ.: *The People v. Walling*, 53 Mich. 264.

The defences set up were all relative to the Constitutionality of the Act: *first*, that it was contrary to the State Constitution, which was denied by Judge SHERWOOD; *second*, that it was contrary to the commerce, equal rights, and imports clauses of the Constitution of the United States. On this second point, of course the *License Cases* and *Woodruff v. Parham* were considered sufficient authority.

The case was then removed to the Supreme Court of the United States, where the judgment was reversed (January 18, 1886; 116 U. S. 446), on an opinion by Justice BRADLEY, with the concurrence of all the Justices, except Chief Justice WAITE (who did not sit), because the State law imposed a tax discriminating against persons selling goods to be brought from another State; this was expressly upon the authority of *Welton v. Missouri* (*infra*, page 751), and *Brown v. Houston* (*supra*, page 732): and as to the exclusiveness of the Constitutional power over interstate commerce, upon the concurring opinion of Justice JOHNSON in *Gibbons v. Ogden*.

The latest of the liquor cases also arose in the State of Michigan, in the State Circuit Court for Iron County, in the prosecution of Henry Lyng, as agent of a Wisconsin firm, for selling lager beer at wholesale, in the original packages in which it had been shipped, and without having complied with—

AN ACT to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or deliver-

ing spirituous and intoxicating liquors, and malt, brewed, or fermented liquors and vinous liquors in this State, and to repeal all acts or parts inconsistent with the provisions of this Act. Approved, June 28, 1887: Public acts, 446-60.

SECTION 1. *The People of the State of Michigan enact*, That in all townships, cities and villages of this State, there shall be paid annually, the following tax upon the business of manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling, or keeping for sale, or manufacturing, distilled, or brewed, or malt liquors, or mixed liquors as follows: * * * * Upon the business of selling only brewed or malt liquors, at wholesale or retail, or at wholesale and retail, three hundred dollars per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, five hundred dollars; or at wholesale and retail, eight hundred dollars per annum; upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum; upon the business of manufacturing for sale spirituous or intoxicating liquors, eight hundred dollars per annum. No person paying a tax on spirituous or intoxicating liquors under this act shall be liable to pay any tax on the sale of malt, brewed, or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors under this act, shall be liable to pay a wholesale dealer's tax on the same.

Having been convicted, Lyng removed the case to the State Supreme Court, where the judgment was directed to be entered against him (April 19, 1889), on an opinion by LONG, J., in which there was *first*, a denial of any discrimination such as in *Walling v. Michigan* (*supra*, page 738), because the liquor might have been manufactured within the State, and *second*, a repetition of the legal heresy that delivery to the consignee terminated interstate commerce. The Supreme Court of the United States, on removal to that Court, again denied the principles upon which the Michigan Court proceeded: *Lyng v. Michigan* (1890), 135 U. S. 161, Chief Justice FULLER pointing out that the manufacturer in another State was required by this unconstitutional law, to pay three hundred dollars, while the Michigan brewer only sixty-five dollars. Justices HARLAN, GRAY and BREWER dissented upon the grounds stated in their dissent in (*Leisy v. Hardin*, *ante*, pages 513-44).

The effect of *Hinson v. Lott* and *Woodruff v. Parham*, in allowing a State to tax, so long as no discrimination was practiced against the products of other States, appeared in a

number of State laws ingeniously contrived for the purpose of going at least up to this boundary line. In addition to the laws designed to have a general effect (*supra*, pages 727-8), and those relating to the liquor traffic, just treated of, there was another important class intended to restrain traveling salesmen. Such laws are considered together, under the case of *Ward v. Maryland, infra*, page 748.

XVI.

Congress can not exercise police powers within a State : though a State can not, by its police power, prevent interstate commerce.

The Supreme Court of the United States will uphold State police regulations, when enacted in good faith and appropriate to the protection of life, liberty and property.

A provision in an internal revenue act, fixing the flashing point of illuminating oil, is of no effect in a State.

A patent for illuminating oil, is no defense for violating a State regulation forbidding the sale of such oil.

The United States v. DeWitt (1870), 9 Wall. (76 U. S.) 41, under another section of the Internal Revenue Act, also raised the question of the exclusiveness of State authority in local affairs. DeWitt was indicted in the United States District Court for the Eastern District of Michigan, under Section twenty-nine of the Act of March 2, 1867 (14 Stat. at Large 484), amending the Internal Revenue laws, by making a misdemeanor the sale of illuminating petroleum oil which was inflammable at less than 110° Fahrenheit. To this indictment a demurrer was interposed, that this section was not a valid and Constitutional law, and Justice SWAYNE and the District Judge WILKINS differing, June 6, 1868, the case was certified to the Supreme Court, where the Attorney General argued in support of the law, that it was for taxation merely, thus conceding the power of the State over police regulations. But Chief Justice CHASE thought this section a police regulation and consequently not valid within the

territory or a State, citing the *License Cases*, the *Passenger Cases* and the *License Tax Cases*, *supra*, pages 453, 460, 722.

That such matters lay exclusively within the police power of the States, was distinctly affirmed on the authority of *U. S. v. DeWitt*, in *Patterson v. Kentucky* (1879), 7 Otto (97 U. S.) 501, where Patterson had been indicted, December 11, 1874, in the Paducah City Court, for selling Aurora Oil after it had been condemned by the State inspector as unsafe for illuminating purposes, under the Kentucky act of February 21, 1874. This oil had been patented by the defendant and the patent was set up as a defense, so as to raise a conflict between the United States Patent laws and the State act.

Upon appeal, the judgment was affirmed by the Court of Appeals, September 22, 1875, quoting the decision of KENT, in one of the cases arising out of the steamboat monopoly of Livingston and Fulton (*supra*, page 429), and *U. S. v. DeWitt*, just considered, and concluding:—

The right of a State to protect its citizens from the danger attending the use of such fluids, although patented, is not inconsistent with any patent regulation, nor in violation of the Federal Constitution: (11 Bush, Ky., 311, 316).

The case was then removed to the Supreme Court of the United States, where the judgment was again affirmed, Justice HARLAN delivering the unanimous opinion of the Court that the Kentucky statute was a police regulation against which the patent laws of the United States conferred no immunity, because—

The right to sell the Aurora Oil was not derived from the patent; that right existed before the patent, and unless prohibited by valid local laws, could have been exercised without the grant of letters patent. The right which the patent primarily secures, is the exclusive right in the discovery, which is an incorporeal right, or, in the language of Lord MANSFIELD, in *Millar v. Taylor* (1769), 4 Burr. 2303, “a property in notion,” which “has no corporeal tangible substance.” The enjoyment of that incorporeal right may be secured and protected by national authority, against all hostile State legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation, simply because the inventor acquires a monopoly in the discovery: (7 Otto 97 U. S. 506.)

This decision that the patent laws did not prevent State laws from requiring a license for the sale of the patent article, or other regulation, was followed in *Webber v. Virginia* (1881), 13 Otto (103 U. S.) 344; but the ingenuity of State evasion required that it should be allowed no further effect. For, in *Minnesota v. Barber* (1890), 136 U. S. 313, the Court was asked to recognize the police power of the State, not only over degrees of fire test for illuminating oil, but also over the time between killing and offering meat for sale. Justice HARLAN replied, that—

There is no real analogy between that case and the one before us. The Kentucky Statute prescribed no test of inspection, which, in the nature of the property, was either unusual or unreasonable, or which, by its necessary operation, discriminated against any particular oil because of the locality of its production. * * * *

But a law providing for the inspection of animals whose meats are designed for human food, cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State, of sound meats, the product of animals slaughtered in other States: (136 U. S. 327, 328).

XVII.

The Constitutional power to regulate commerce extends over that commerce which, though carried on within a State, is a part of interstate or foreign commerce.

Navigable waters of the United States are those used as a part of the means for interstate and foreign commerce.

A steamboat navigating only within a State, must have the United States license, if she carries freight and passengers ultimately destined to another State or a foreign nation.

Trans-shipment of freight destined to another State or nation, does not so break up the carriage as to remove it from the Constitutional power into the domain of the State's police power.

The Constitutional power cannot be defeated by the number of separate carriers, or similar details.

The case of *The Daniel Ball* lies within the purview of this article because it called for an examination of the Constitutional power over commerce within a State. Had the views of Justice WOODBURY (*ante*, page 462) prevailed, it would have been enough to say that the principle upon which they rested would have authoritatively settled this case the other way from the final judgment of the Supreme Court of the United States.

The case began by an information filed in the United States District Court for the Western District of Michigan, April 2, 1868, against the steamboat *Daniel Ball*, for navigating the Grand River, in that State, with merchandise and passengers, but without the United States license required by—

CHAP. CXCI. *An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.* Approved July 7, 1838; 5 Stat. at Large 304.

SEC. 2. *And be it further enacted*, That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the said first day of October, one thousand, eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States, the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged, shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offense.

This statute was repealed by the Act of February 28, 1871, which substituted the description of waters:—

SEC. 41. *And be it further enacted*, That all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this Act: *Provided*, That this act shall not apply to public vessels of the United States, or vessels of other countries, nor to boats, propelled in whole, or in part, by steam, for navigating canals: (16 Stat. at Large 453).

In the Revised Statutes, this language was simplified into—

SEC. 4400. All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title.

The defense offered was that the steamer was so constructed as to be incapable of navigating the waters of Lake Michigan, into which the river emptied; that her passengers and cargo, when destined to other States, were delivered to forwarding agents at Grand Haven, and by them sent on to their destination; and that, consequently, the steamer was engaged in domestic State commerce only, and not in the navigation subject to the laws of the United States.

The United States District Judge (SOLOMON L. WITHEY) dismissed the libel, July 28, 1868, (1 Brown 202) in order to secure uniformity of decision in the two Districts of the State, and not because he agreed with the reasoning which made trans-shipment a determining fact against the very purpose of that change of carriers. The case was then removed to the Circuit Court where (November 6, 1868) the decree was reversed, the libel sustained and the penalty decreed, the Court being composed of Justice SWAYNE and the District Judge. On appeal to the Supreme Court, the reasoning of the District Judge and the decree of the Circuit Court were affirmed upon a unanimous opinion by Justice FIELD (January 23, 1871; 10 Wall. 77 U. S. 557), upon two grounds: *first*, that the River was a navigable water of the United States, in contradistinction to the navigable waters of a State, because it formed, *in its ordinary condition*, and in connection with other waters, a continuous highway over which commerce might be, and was, carried on with other States or foreign countries, in the customary modes. The words printed in italics serve to distinguish this case from *Veazie v. Moor* (1852), 14 How. (55 U. S.) 568, 574 (*infra*, page 823), and *Escanaba Co. v. Chicago* (1883), 107 U. S. 678, 682, which were in fact but applica-

tions of the principles of *Willson v. The Marsh Co. supra*, pages 445, 482 : as well as to prevent a misapprehension, from the citation by Justice FIELD, of *The Genessee Chief* (1851), 12 How. (53 U. S.) 443, and *Hine v. Trevor* (1867), 4 Wall. (71 U. S.) 555, which involved the general doctrine of navigability in America. That question is at rest : *Ex parte Boyer* (1884), 109 U. S. 629 ; *The Eagle* (1869), 8 Wall. (75 U. S.) 15 ; *The Montello* (1871), 11 Wall. (78 U. S.) 411, and (1874), 20 Wall. (87 U. S.) 430, where the principles of the opinion in the case of the *Daniel Ball*, were applied to the Fox River, Wisconsin, notwithstanding portages around obstructions. Moreover, both the subject and limits of this article forbid even a fuller discussion of the difference between waters not subject to Congressional regulation and those like the Grand River, just as when discussing the bridge cases (*ante*, pages 480-1), the power to bridge was considered only in connection with interstate and foreign commerce.

The *second* ground for the opinion of Justice FIELD was the destination of the steamer's merchandise and passengers, notwithstanding the fact that the steamer was not run in connection with any other carrier : that is—

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress : FIELD, J., *The Daniel Ball* (1871), 10 Wall. (77 U. S.) 557, 565.

This statement was avowedly founded on MARSHALL'S definition of the force of "Among" (*supra*, page 435) and the possibility of defeating the Congressional power by the simple expedient of combining different carriers, each taking up the transportation at the boundary line of the adjoining States. The propriety of avoiding this possibility, which might arise through change of carriers, or other accidents or conveniences of commerce, was repeated by the same justice in the Brooklyn Bridge case of *Miller v. Mayor of New*

York (1883), 109 U. S. 385, 395, and had one of its most salutary applications in the case of *Heck & Petree v. East Tenn., Vir. & Ga. RR. Co.* decided by the Interstate Commerce Commission, on a report and opinion by Commissioner MORRISON, February 15, 1888 (3 Ann. Report 211; 27 AMER. LAW REGISTER 273). The complainants were refused transportation of their coal from their mines located on the Coal Creek & New River Railroad. This railroad was the only means for carrying the complainants' coal from their mines, and yet presumed to deny transportation upon the ground that it was a State corporation whose line was wholly within the State of Tennessee. But the opinion declared this railroad to be one of the instrumentalities of shipment or carriage included in the term "transportation," and the complainants therefore to be entitled to have their coal carried out on its way to market in another State. The actual cause of the refusal to carry the coal, was a disagreement amongst the stockholders, and on this account a Constitutional question was raised and decided for the benefit of the public.

The principle that the commencement of the movement of merchandise destined for another State or nation, is the period of time when the Congressional power attaches, was afterwards distinctly declared in *Coe v. Errol* (*infra*) as well as recognized in *Kidd v. Pearson* (1888), 128 U. S. 1, 25; to that portion of this article, reference may be made for further examination.

XVIII.

A State tax upon a drummer or person who sells by sample, catalogue or trade list, or upon one whose occupation consists in selling goods, is a tax upon the goods and not a mere license to carry on the avocation.

A non-resident cannot be required to pay a tax measured by his stock of goods in another State, or by his capacity to do business all over the United States and not merely within the taxing State.

A non-resident who opens a place of business and employs drummers in a State, cannot object to State taxes which are no greater than those imposed upon residents of the State: but there must be no discrimination.

Any tax or fee, imposed upon non-resident dealers or their salesmen, maintaining no place of business in the State, is a tax upon interstate commerce, and is void.

A State cannot require a non-resident drummer to pay a license fee for the privilege of selling.

A non-resident's exemption from State taxation is not a greater privilege than enjoyed by residents: the State has the power to tax residents, and in that way, the ability to prefer non-residents.

Commerce between a State and the District of Columbia cannot be restrained by municipal regulations in the District to any greater extent than commerce among the several States.

Congressional regulations of commerce must be general and not local.

The agent of a distant but interstate railroad may solicit passengers without paying a State license fee.

Commerce among the States includes commerce out of, as well as into a State.

A State may not tax commerce among other States.

The agents and other facilities selected by interstate carriers need not be essential to the conduct of their business in order to prevent State regulation or taxation.

In *Ward v. Maryland* (1871) 12 Wall. (79 U. S.) 418, the Grand Jury for the City of Baltimore, December 4, 1868, prosecuted Elias Ward, a non-resident, for offering to sell certain merchandise by sample, without the license required by Act of March 30, 1868, repealing certain Amendments of the Code and substituting the following section:—

37. No person, not being a permanent resident in this State, shall sell, offer for sale, or expose for sale, within the limits of the City of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products, and articles manufactured in the State of Maryland, within the limits of the said City, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do: [Chap. 413, Laws, pages 786-7: the other clauses merely enforcing the above.]

This license was double that required of a resident of the State.

Ward having admitted the facts, was adjudged guilty and fined. On appeal, this judgment was affirmed, the State Court denying that the law transgressed the commerce or equal rights clauses of the Constitution: *Ward v. The State* (1869), 31 Md. 279. That is, the State Court held the tax to be one on a person, and not on goods which were not even alleged to be in the original packages in which they had been brought into the State:—

There is nothing in this, or any other law of the State, which prohibits or restrains non-resident merchants, manufacturers, or traders, or other agents, from bringing their goods here, and selling them in the same mode and under the same license as residents of the State. A custom, however, has grown up in recent times with merchants and manufacturers, in the large manufacturing and commercial cities and States, of traveling or sending agents or runners through other States and cities, with samples, cards, catalogues, or trade-lists of their goods, and thereby selling by retail, or wholesale, large quantities of merchandise, located beyond the limits of the States, where they thus sell, and not subject to the local State, county, or municipal taxation, as are like goods in the hands of resident merchants, or traders, to the great detriment of the business and trade of the latter. Large sales are thus made, and an extensive and lucrative business is thus carried on, and it is the object of the law in question to search and subject to taxation, by means of a license, the trade and business thus transacted within the limits of the principal City of this State. It is, therefore, a tax upon a particular business or trade, carried on in a particular mode within the limits of the State, by a particular class of persons, and not a tax upon goods or merchandise imported into a State, either from foreign countries, or from States, and the question is as to the power of the State to impose such tax: MILLER, J., 31 Md., 285.

Appealing to the Supreme Court of the United States, Ward secured a reversal on the ground that the equal rights clause of the Constitution [Art. IV. Sec. 2], had been vio-

lated; the opinion was written by Justice CLIFFORD, with the assent of Chief Justice CHASE, and Justices NELSON, SWAYNE, DAVID DAVIS, STRONG, MILLER and FIELD. Justice BRADLEY went further and thought the commerce clause had been violated also, for—

Such a law would effectually prevent the manufacturers of the manufacturing States from selling their goods in other States, unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a duty upon importation from one State to another, under the name of a tax: (12 Wall. 79 U. S. 432-3).

Without enforcing or repealing the law thus declared unconstitutional (BARTOL, C. J., 57 Md., 263), the Maryland legislature amended the sections of the Code applicable to resident traders, so that—

SEC. 41. No person or corporation, other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale, any goods, chattels, wares or merchandise, within this State, without first obtaining a license in the manner herein prescribed: *provided*, persons carrying on the shad and herring fisheries in this State may sell and dispose of so much salt as may be necessary to cure the fish purchased of them during the months of March, April and May, and no longer, without license, and that nothing herein contained shall extend to vendors of cakes, or to the vendors of beer and cider, who are the makers of such beer and cider, but nothing herein shall exempt any vendors of lager beer, from the requirements to obtain a license to sell said lager beer: Chap. 349, Laws of 1880; still in force, Pub. Gen. L., 1888, Art. 56, § 35.

Under this Chapter, a New Yorker, George W. Corson, was indicted March 22, 1881, for selling tea by sample to a Baltimorean, and being convicted, appealed to the State Court of Appeals. That tribunal thought that Ward had escaped because the law (*supra*, page 749), had discriminated against a non-resident, but here, in Corson's case, the new law seemed impartial. Nor could the State Court appreciate the argument founded upon the amount of the license, fixed by—

SEC. 43. The applicant shall state to the clerk on oath, to be administered by the clerk, or if the applicant reside in a county, to be administered by the said clerk or any justice of the peace, the amount of said applicant's stock of goods, wares and merchandise generally kept on hand by him or the concern in which he is engaged, at the principal season of

sale; or if said applicant shall not have previously engaged in such trade or business, the amount of such stock he expects to keep as aforesaid: Chap. 414, § 3, Laws of 1858; still in force, Pub. Gen. L., 1888, Art. 56, § 37.

Corson contended that this Section operated to tax property out of the limits of the State; and although this was denied by Chief Judge BARTOL, in delivering the opinion (57 Md. 251, 266), which affirmed Corson's conviction (July 22, 1881), because the tax was not on goods but by a standard fixed by the value of the goods; yet this contention had great weight in the Supreme Court of the United States, where the case was removed and reversed, March 7, 1887. This case of *Corson v. Maryland* (120 U. S. 502), was heard, with *Robbins v. Taxing District* (*infra*, page 758), and the State law declared unconstitutional for the same reasons; but the dissenting Justices in the Robbins Case, here agreed to the judgment of reversal of the Maryland conviction, because the license required in that State was, in their opinion, measured by the capacity of the drummer's principal to do business all over the United States, and without reference to the amount done or to be done in Maryland: per WAITE, C. J., 120 U. S. 506.

Welton v. State of Missouri (1876), 1 Otto (91 U. S.) 275, was another license case which began by the indictment of M. M. Welton, April 13, 1872, in the State Circuit Court for the County of Henry, State of Missouri, for selling sewing machines manufactured in another State, without the license required by—

SECTION 1. Whoever shall deal in the selling of [patents, patent rights] patent or other medicines, [lightning rods] goods, wares or merchandise, except books, charts, maps and stationery, *which are not the growth, produce or manufacture of this State*, by going about from place to place to sell the same, is declared to be a peddler; Gen. Stat. 1865, chapter 96, page 417; Wagner's Stat. 979, as amended by Act of April 12, 1877, Laws, page 295, striking out the words *in italics* and inserting the bracketed words; Rev. Stat. 1879, §6471 and 1889, §7211.

SEC. 2. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents, or otherwise; and no peddler shall sell wines or spirituous liquors: *Id.* and Rev. Stat. 1879, §6471, and 1889, §7212.

Being convicted, notwithstanding the defence of the repugnancy of this State law to the Constitutional provisions, regulating commerce and forbidding imposts (*supra*, pages 420, 425), Welton removed the case to the State Supreme Court; where the judgment was affirmed, January 26, 1874, on an opinion in which *Ward v. Maryland*, (*supra*, page 748) was distinguished on the ground there and often supposed to prevent the law being obnoxious to the Constitutional provision: namely that the tax was on the person, and not on the goods.

The law in question [in the Maryland case], discriminated between citizens of Maryland and citizens of other States pursuing the same calling in Maryland, and levied a higher tax upon the nonresident peddler. But there is no such feature in our law. Whether the peddler comes from Maine or Louisiana, or has been born and lived here all his life, makes no difference in the tax he pays for a peddler's license: NAPTON, J., *State v. Welton* (1874), 55 Mo. 288, 291.

The judgment was then removed to the Supreme Court of the United States, and there reversed upon a unanimous opinion by Justice FIELD, on the ground of discrimination in the State statute against the growth, products and manufactures of another State, as no license was required for peddling such articles, if of Missouri origin; that is, following *Brown v. Maryland* (*supra*, page 439).

Where the business, or occupation, consists in the sale of goods, the license tax required for its pursuit, is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through a license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any less invalid because enforced through the form of a personal license. FIELD, J., *Welton v. Mo.* (1876), 1 Otto (91 U. S.) 275, 278.

Alluding to the exception of injurious discrimination, in *Woodruff v. Parham* (*supra*, pages 728, 730), and declaring that inaction by Congress is equivalent to a declaration of freedom, and quoting from *Brown v. Maryland*, the immunity there declared for original packages within the Constitutional meaning of this expression (*supra*, page 443), the opinion proceeded:—

Following the guarded language of the Court in that case [of *Brown v. Maryland*], we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application, to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment unconstitutional and void: *FIELD, J., Welton v. Mo.* (1876), 1 Otto (91 U. S.) 275, 282.

Welton v. Missouri was one of the decisions, which its writer afterwards supposed (in *Mugler v. Kansas*, 1887, 123 U. S. 623, 676) to be an abandonment of the Constitutional construction upon which the *License Cases* had been decided: this has already been alluded to and a quotation printed on page 459, *supra*. Here may be added that Justice BRADLEY had previously extracted the general principle of non-taxation of goods carried from State to State because of their origin (*Phila. & S. M. S. Co. v. Comm. Pa.*, 1887, 122 U. S. 326, 341), as well as potency of Congressional non-action (*Robbins v. Taxing Dist.*, 1887, 120 U. S. 489, 493; *Walling v. Mich.*, 1886, 116 Id. 446, 454; and *Brown v. Houston*, 1885, 114 Id. 622, 631); so also, Justice BLATCHFORD in *Pickard v. Pullman S. Car Co.*, (1886) 117 Id. 34, 49; Justice SWAYNE in *Machine Co. v. Gage* (1880), 10 Otto (100 U. S.) 676, 678; and Chief Justice WAITE in *Hall v. De Cuir* (1878), 5 Otto (95 U. S.) 485, 490; as had Justice MILLER, the principle against discrimination (*Wabash, St. L. & P. RR. Co. v. Ill.*, 1886, 118 U. S. 557, 574, 589; *Cook v. Pa.*, 1878, 7 Otto 97 U. S. 566, 573); so also Justice HARLAN in *Guy v. Baltimore*, (1880) 10 Otto (100 U. S.) 434, 439.

All of these principles depending upon the doctrine of *Cooley v. Port Wardens* (*supra*, page 466), as Justice FIELD said himself (*Mobile Co. v. Kimball*, 1881, 12 Otto 102 U. S. 691, 702), so that the *License Cases* would seem to have been in fact overruled within five years after their decision.

The *Howe Machine Co. v. Gage* (1880), 10 Otto (100 U.

S.) 676, originated before S. HEERMANS, Justice of the Peace of Sumner County, Tennessee, March 30, 1876, by the plaintiffs suing the County Clerk to recover fifteen dollars and costs paid him under protest for the privilege of peddling sewing machines in that County, under the provisions of the Code, Section 553, in subsection 43, now increased to twenty dollars by Section 618 of the Code of 1884. Peddlers of articles manufactured, or made up in the State and of scientific and religious books (Code of 1871, § 546), and all articles manufactured of the produce of the State (Act of March 24, 1875, Chap. 98, § 1) were at this exempt, in obedience to—

SEC. 30. No article manufactured of the produce of this State, shall be taxed otherwise than to pay inspection fees : Const. 1870, Art. II.

The judgment was rendered in favor of the Clerk, and the plaintiffs appealed to the State Circuit Court, where the judgment was affirmed, November 13, 1876, on an agreed statement of facts, that the plaintiffs manufactured their sewing machines in Connecticut, but had an office in Nashville, Tennessee, from whence the agent had traveled in a wagon, peddling the machines through the country districts. The plaintiffs then appealed to the State Supreme Court, where the judgment was again affirmed, March 2, 1877, upon an opinion distinguishing *Welton v. Missouri* (*supra*, page 751), where the statute was aimed directly at the importation and peddling of merchandise ; for—

Our statute is comprehensive and applies to the resident as well as the nonresident—to home manufacturers as well as to the importer of foreign goods, or goods manufactured out of, and not of the growth or produce of the State ; it is not an attempt to lay imposts, or duties on imports or exports, but broadly levies a tax upon all peddlers of sewing machines without regard to place of growth, or produce of material, or of manufacture. Again, while our [State] Constitution ordains that no article manufactured of the produce of the State, shall be taxed otherwise than to pay inspection fees, it also ordains, as we have already noticed, that “the Legislature shall have power to tax merchants, peddlers, and privileges,” etc. The two clauses must be construed *pari passu*, and effect given to each : TURNER, J., *Machine Co. v. Cage* [sic] (1877), 9 Baxter (Tenn.) 518, 521.

The plaintiffs then removed the judgment to the Supreme Court of the United States, where the judgment was again and finally affirmed, March 29, 1880, on a unanimous opinion by Justice SWAYNE, who professed to be bound by the construction put upon the State Constitution and laws by the State Court. For this, he cited *Leffingwell v. Warren* (1862), 2 Black (67 U. S.) 599.

The same principle of following the decisions of State Court, construing State Constitutions and laws, was observed in the Texas liquor cases (*supra*, page 736), and is therefore worthy of some examination here. The great number of cases in which the principle has been followed, forbids any complete mention of them, and perhaps the briefest practical method is to refer to a recent case where the principle was recognized and restrained thus :—

In the case of the petitioner brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal under the Constitution and laws of the State, is not open to us. And, although that question might have been considered in the Circuit Court, in the application made to it, and by this Court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State court upon the points involved in that inquiry. That, however, does not preclude this Court from putting upon the ordinances of the supervisors of the County and City of San Francisco, an independent construction ; for the determination of the question whether the proceedings under these ordinances, and in the enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and judge. We are consequently constrained, at the outset, to differ from the Supreme Court of California, upon the real meaning of the ordinances in question : MATTHEWS, J., *Yick Wo v. Hopkins*, Sheriff and *Wo Lee v. Same* (1886), 118 U. S. 356, 363-6.

That is, the Supreme Court of the United States is the interpreter of the Constitution, and in performing this duty is not hampered by State constructions of State laws : else the declared supremacy of the Constitution might be more threatening than real : (See above, page 425). For this reason *Yick Wo v. Hopkins*, as well as *Henderson v. The*

Mayor ; Walling v. Michigan (*supra*, pages 465, 738), and *RR. Co. v. Husen* (*infra*, page 801) were cited upon the paramount authority of the Constitution of the United States, over the police power of the States, by Justice HALLAN, in *Mugler v. Kansas* (1887) 123 U. S. 623, 663.

This case of *Machine Co. v. Gage*, did not receive much recognition, before the dissenting opinion of Justice GRAY (*ante*, page 536): for in *Walling v. Michigan* (1886), 116 U. S. 446, 461, Justice BRADLEY merely mentioned it as not sustaining an occupation tax so specialized as to discriminate against the products of another State; and after citing the latter case, Justice BLATCHFORD, in *Pickard v. Pullman S. Car Co.* (1886), 117 U. S. 34, 49, referred to *Machine Co. v. Gage*, with some others, as containing a collection of cases on the indication of Congressional pleasure from non-action, that interstate commerce should be free from State interference. Finally, in *Robbins v. Taxing District* (1887), 120 U. S. 489, 497, Justice BRADLEY delivering the majority opinion, in which a drummer's tax was declared invalid (*infra*, page 758), pointed out the controlling fact of the machines, though manufactured in another State, having been received at the office in Nashville and from thence peddled; that is, the arrival of the goods in the State placed them within its taxing power (*supra*, page 727), though the laying of a tax on a peddler, because the goods were made in another State, would transgress the Constitutional freedom of trade, where the peddler had arrived from another State (*infra*, page 759), or while the goods remained in the Constitutional condition of an original package (*supra*, pages 721, 728, 459, 491).

In *Webber v. State of Virginia* (1881), 13 Otto (103 U. S.) 344, the plaintiff had been indicted in the County Court of Henrico, May 12, 1880, for selling Singer sewing machines, which had been manufactured in New York State, without having paid a tax required by, and not being excepted from, the Virginia Act of March 27, 1876, which provided that—

45. *Any person who shall sell or offer for sale, the manufactured articles*

or machines of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or take orders therefor, on commission, or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles, through the agency of another; but a separate license shall be required from any agent, or employee, who may sell, or offer to sell, such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars, nor more than one hundred dollars, for each offence: (Laws of 1875-6, pages 184, 185).

46. The specific license tax upon an agent, for the sale of any manufactured article or machine of other States or Territories, shall be twenty-five dollars; and this tax shall give to any party, licensed under this section, the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell, or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. *All persons, other than resident manufacturers, or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section:* (Id).

So far as the Singer machine was a patented article, all the courts followed *Patterson v. Kentucky*; *supra*, page 742.

Upon the question of discrimination between manufacturers in the State and those of other States, the County Judge, B. R. WELLFORD, read the two sections together, omitting the words in roman, and concluded that the purpose of the statute was to impose the tax upon the person, and not on the goods; hence the act was constitutional, following *Hinson v. Lott*, *supra*, page 735.

Under these rulings, Webber was convicted in the County Court, and this judgment was affirmed in the State Supreme Court of Appeals, upon the same grounds, in an opinion by Judge STAPLES: 33 Grat. (Va.) 898. The judgment was then removed to the Supreme Court of the United States and there reversed upon the ground of discrimination apparent from reading the two sections together, as the Virginia Court did, with the opposite result:—

By these Sections, read together, we have this result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells, or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimi-

nation in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents, when thus engaged, is therefore a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is, to that extent, a regulation of commerce in the articles, between the States. It matters not whether the tax be laid directly upon the articles sold, or in the form of licenses for their sale. If by reason of their foreign character, the State can impose a tax upon them, or upon the persons through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States: FIELD, J., *Webber v. Va.* (1881), 13 Otto (103 U. S.) 344, 350.

This was precisely the position of the Court in *Brown v. Maryland*, in response to the sentiment that there should be confidence in the State governments: (*supra*, pages 440-1): and it was fortified by a reference to and affirmance of *Welton v. Missouri*, *supra*, page 751.

Robbins v. The Taxing District (1887), 120 U. S. 489, began February 4, 1884, by the arrest of Sabine Robbins for doing business as drummer without license, in Memphis, Tennessee, then officially known as The Taxing District of Shelby County. Robbins was selling paper and stationery for Rose, Robbins & Co., of Cincinnati, Ohio, without complying with the State Act approved April 4, 1881, which amended a prior act to establish taxing districts, and especially—

SEC. 16. *Be it further enacted*, That subsection fifty (50) mentioned in the caption of this Act, be amended to read as follows: All drummers and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the County Trustee, the sum of ten dollars per week, or twenty-five dollars per month, for such privilege, and no license shall be issued for a longer period than three months: (Laws, page 114).

Robbins was convicted in the State Courts, and this judgment was affirmed in the State Supreme Court, on a unanimous opinion by COOPER, J., pointing out the policy of the

State to make the pursuit of numerous enumerated forms of business, a privilege to be paid for by all persons without discrimination, and supposing that the Constitutional right to require a license was well settled, especially as to the National Constitution, by *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, a case of taxation of the agent of the Southern Express Company. *Robbins v. Taxing District* (1884), 13 Lea. (Tenn.) 303, 310. This judgment was then removed to the Supreme Court of the United States, and there reversed, March 7, 1887, upon an opinion by Justice BRADLEY, with the concurrence of Justices MILLER, HARLAN, MATTHEWS and BLATCHFORD (120 U. S. 489).

A dissenting opinion was read by Chief Justice WAITE, for himself and Justices FIELD and GRAY, in which the chief reliance was placed, as by the State Court, upon *Osborne v. Mobile*, just mentioned, where the opinion was delivered by Chief Justice CHASE, with the assent of Justices CLIFFORD, SWAYNE, MILLER, DAVID DAVIS, FIELD, BRADLEY, STRONG and HUNT. But this case is now of little value since the decision in *Leloup v. Mobile* (1888), 127 U. S. 640, where Justice BRADLEY delivered the unanimous opinion, denying the right of a State to require a telegraph company to pay a license fee for the transaction of interstate business.

This dissenting opinion in *Robbins v. Taxing District*, expressly disclaimed the consideration of a tax upon a drummer without samples; but this is now a matter of no importance, since the unanimous judgment of the Supreme Court of the United States in *Asher v. Texas* (1888), 128, U. S. 129, on an opinion also by Justice BRADLEY, affirming *Robbins v. Taxing District*, and declaring unconstitutional the Texas Act of May 4, 1882, amending the Revised Statutes of 1881, so as to read:—

ARTICLE 4665. That there shall be levied on and collected from every person, firm, company or association of persons pursuing any of the following named occupations, an annual tax, except when herein otherwise provided, on every such occupation or separate establishment, as follows:—
* * * * from every commercial traveler, drummer, salesman, or

solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance ; * * * and every commercial traveler, drummer, salesman, or solicitor of trade who shall fail, or refuse to exhibit said receipt to such officer on demand by him, shall be deemed guilty of a misdemeanor, and fined, in a sum not less than twenty-five, nor more than one hundred dollars : (Laws, pages 18 and 19).

While this act covered those within the exception of WAITE'S dissenting opinion, Asher was in fact selling rubber stamps, and the opinion in his case, was an unqualified and unanimous assent to *Robbins v. Taxing District*. The opinion of the Court of Appeals of Texas undoubtedly forced the Supreme Court of the United States to the full extent of their previous position, for the Texas Judge (WHITE) said :

But such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if in themselves unwarranted assumptions of Constitutional authority—invocations of the Federal power, when such power does not and was never intended to apply and operate ; and, moreover, when said decisions are directly in conflict with well adjudicated cases of the same Court, which are not overruled, and which, in addition to their equal authority, are based upon fundamental and eternal principles of reason, justice and right : *Ex parte Asher* (1887), 23 Texas Ap. 662, 667 ; S. C. 27 AMER. LAW REGISTER, 77, 79-80.

Divested of its rhetoric, it will be observed that this Texas decision was founded upon the rule of uniformity declared in *Woodruff v. Parham*, and *Hinson v. Lott* (*supra*, pages 728, 735), and upon the exception recognized in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, and the case of the *State Tax on Railway Gross Receipts* (1873), 15 Wall. (82 U. S.) 284, where the power of a State to tax persons and property within its limits was declared not to be restrained by the mere fact that interstate commerce would be more expensively conducted ; hence Osborne, an express agent, was required to obtain a license, and the Philadelphia and Reading Railroad Company was required to pay a tax to the State which chartered it, upon its gross receipts, including those from interstate commerce.

These two last cases are directly in point. They were decided by a unanimous Court. They are not overruled in *Robbins v. Taxing District*, relied upon by the applicant in this case. They are directly in conflict with the Robbins case, and the Robbins case is simply the opinion of a

majority, and not of the whole Court. WAITE, C. J., in, to our minds, an unanswerable opinion, concurred in by those profound and eminent jurists, FIELD and GRAY, dissented from the doctrine announced. Under such circumstances, we do not feel bound by the Robbins decision, and not believing it to be the law of the land, we will not consider it as of binding force upon us: WHITE, P. J., *Ex parte Asher*, 23 Texas App. 674; 27 AMER. LAW REGISTER, 86-7.

It has already appeared that *Osborne v. Mobile*, is no longer a valid precedent (*supra*, page 759), and it may now be observed that the exception recognized in the case of the *State Tax on Railway Gross Receipts* (vide, page 760, *supra*), has been denied as to the business of carrying on interstate commerce by Justice BRADLEY in *Phila. & S. S. Co. v. Pa.* (1887), 122 U. S. 326, 342, and in *Leloup v. Mobile* (1888), 127 Id. 640, 646, where he said—

A great number and variety of cases, involving the commercial power of Congress, have been brought to the attention of this Court within the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been, that in order to give full and fair effect to the different clauses of the Constitution, the Court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice MARSHALL and other members of the Court in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached, upon the fairest and most just construction of the Constitution in all its parts. In our opinion, such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress: BRADLEY, J., *Leloup v. Mobile* (1888), 127 U. S. 640, 648.

To this statement of the prevailing principle of construction is appended a reference to the *Case of State Freight Tax* (1873), 15 Wall. (82 U. S.) 232; *Pensacola Tel. Co. v. W. U. Tel. Co.* (1878), 96 U. S. 1; *Mobile v. Kimball* (1881), 102 Id. 691; *W. U. Tel. Co. v. Texas* (1882), 105 Id. 460; *Moran v. N. O.* (1884), 112 Id. 69; *Gloucester F. Co. v. Pa.* (1885), 114 Id. 196; *Brown v. Houston*, *supra*, page 732; *Walling v. Michigan*, *supra*, 738; *Picard v. P. S. C. Co.*

(1886), 117 Id. S. 34; *Wabash R. R. Co. v. Ill.* (1886), 118 Id. 557; *Robbins v. Taxing Dist. supra*, page 758; *Phila. & S. S. Co. v. Pa.* (1887), 122 U. S. 326; *W. U. Tel. Co. v. Pendleton* (1887), Id. 347; *Ratterman v. W. U. Tel. Co.* (1888), 127 Id. 411. To these may be added *W. U. Tel. Co. v. Alabama* (1889), 132 U. S. 472, 477; *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 Id. 465, 497; *Fargo v. Stevens* (1887), 121 Id. 230, 246; *Corson v. Md. supra*, page 750; and *Lyng v. Mich., supra*, page 739, and the emphatic language of Justice BRADLEY, when writing the unanimous opinion of the Court in *Asher v. Texas*.

Turning to the dissenting opinion of Chief Justice WAITE, so highly praised in Texas but no longer law in any part of the Union, the principal foundation for it appears to be a supposed preference of strangers over citizens, largely based upon confusion of the two different methods of sale, by sample and by carrying and delivering the goods. Upon this confusion of thought, a portion of the majority opinion should be read :—

Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept for sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kinds of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse and wait for the people of those States to come to him? This would be a silly and ruinous proceeding. * * * The truth is, that in numberless instances, the most feasible, if not the only practicable way for the merchant or manufacturer to obtain orders in other States, is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business, he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. * * * But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits. * * * It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even

on that of postmaster or United States Marshal. * * * * If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it: for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States: BRADLEY, J., *Robbins v. Taxing District* (1887), 120 U. S. 489, 495-8.

The latest of the decisions giving freedom to drummers, is *Stoutenburg v. Hennick* (1889), 129 U. S. 141, which began by the arrest of William J. Hennick in Washington City, D. C., for acting as commercial agent of a Baltimore wholesale house, without having paid the license fee required by the District Act of August 23, 1871, Section 21:—

Third, Commercial agents shall pay two hundred and fifty dollars. Every person residing in the District of Columbia, whose business it is, as agents for nonresident manufacturers or wholesale dealers, to offer for sale merchandise, shall be regarded as a commercial agent: (Acts, Sess. 1, page 93).

Hennick was convicted, but only to be released upon *Habeas Corpus* by the District Supreme Court, May 9, 1887, because the Act was an unauthorized regulation of interstate commerce and obnoxious to the principle of the *Robbins Case* (*supra*, page 758). The discussion of the principles by which the decision was to be reached, extended also to the power of Congress over the District, but no final conclusion was reached as the case required nothing more than the determination that the local government erected by Congress, was municipal and not competent to exercise any larger powers: *Re Hennick* (1887), 5 Mackey 489. The case was then removed to the Supreme Court of the United States where the release of Hennick was affirmed, January 14, 1889, on an opinion by Chief Justice FULLER, on the ground taken in the *Robbins Case*, that such business required uniform regulation, and not Congressional action, directly or indirectly for the District alone. Justice MILLER dissented because the District of Columbia was not a State, a ground which is much too narrow, as was pointed out in the Court below:—

This District is set aside and dedicated to the uses of the Nation, and if there be anywhere on the face of the earth, a locality where no discrimination should be made as against the rights of any of the States, or any citizens of the United States, it should be upon this soil where all are equal, on which each citizen has an equal right and in which each State has an equal right, as regards all the other States, and as regards the United States itself. * * * We cannot suppose that when the Congress was vested with power to legislate over this District, it was clothed with any power to act as such Legislature, in hostility to the rights of the States, or to do anything regarding the interests of the citizens of one State, which any State of the Union could not do with regard to the citizens of any other State: MERRICK, J., *Re Hennick*, 5 Mackey 489.

These sentiments are very similar to the principle expressed by Justice MILLER, in *Crandall v. Nevada* (*supra*, page 464), when denying the validity of a tax upon each passenger leaving the State, as against the authority of *McCulloch v. Maryland* (1819) 4 Wheat. (17 U. S.) 316.

The people of the United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. * * * That government has a right to call to this point, any or all of its citizens, to aid in its service, as members of the Congress, of the Courts, of the Executive Departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. * * * But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it: MILLER, J., *Crandall v. Nevada* (1867), 6 Wall. (73 U. S.) 35, 43-4.

The final result of these progressive decisions is an affirmation of *Robbins v. Taxing District*, *Leloup v. Mobile*, *Asher v. Texas*, *Stoutenburg v. Hennick*, and *Lyng v. Michigan* (herein, pages 758, 759, 760, 763, 739, *supra*), in the case of *McCall v. California* (1890), 136 U. S. 104. This latest case began by the conviction of J. G. McCall, in the police court of the City and County of San Francisco, June 3, 1888, for soliciting passenger traffic in that City, for the Erie Railway, extending between Chicago and New York City, without having paid the quarterly fee required of "every railroad agency," by a municipal regulation (Order No. 1589 of the Board of Supervisors of the City and County of

San Francisco). Upon appeal to the Superior Court of that City, the judgment was affirmed, but upon removal to the Supreme Court of the United States, it was reversed, as the order imposed a tax on interstate commerce.

This effect of the order was denied by the California Court, on the ground that the business of soliciting passengers in California for a railroad wholly outside of that State, did not result in the introduction of anything into the State, and hence could not be an instrument of interstate commerce.

The argument is based upon the assumption that the provision in the Constitution of the United States relating to commerce among the States, applies as a limitation of power, only to those States, through which such commerce would pass, and that any other State can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a State from taxing interstate commerce as it passes through its own territory, *a fortiori* the prohibition will extend to such commerce when it does not pass through its territory. * * * It is further said that the soliciting of passengers, in California, for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax, could not directly affect the commerce of the road, because his business was not essential. The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented, is not the test as to whether that business was a part of interstate commerce. * * * The test is—Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road, to an extent commensurate with the amount of business done by the agent: LAMAR, J., *McCall v. Cal.* (1890), 136 U. S. 104, 110-11.

It seems advisable to add once more, that the subject of State and Congressional regulation of the instruments of commerce cannot be entered into, for want of space: the references already made to such cases as have reached the Supreme Court of the United States, are sufficient to show that the same general principles are there applied.

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(To be concluded in the December number.)